Geh Thuan Hooi (h) v Serene Lim Paik Yan (w)

HIGH COURT (KUALA LUMPUR) — CASE NO S8–33–405 OF 2008
YEOH WEE SIAM JC
15 APRIL 2010

Family Law — Children — Access to children — Free access to children granted in decree nisi — Non-compliance by respondent — Whether violation of order — Whether appellant should initiate committal proceedings

Family Law — Financial obligation — Maintenance — Children — Application for variation of amount payable on grounds of misrepresentation and/or mistake of fact — Whether material change of circumstances to justify variation — Whether variation would affect children's quality of life

Family Law — Matrimonial assets — Matrimonial home — Sale and distribution of — Application after grant of decree nisi — Whether court had jurisdiction — Law Reform (Marriage and Divorce) Act 1976 s 76(1)

This was the appellant's appeal against the refusal for the leave for variation or amendment of the decree nisi dated 28 April 2008. The appellant sought, inter alia, reasonable access to the children of the marriage, reduction of a monthly maintenance payment from RM14,000 to RM2,500, the disposal of matrimonial assets and the equal distribution thereof. The grounds of the application were as follows: (a) the respondent had obstructed or refused to give permission to the appellant to exercise his right of access to the children; (b) RM14,000 for the maintenance of the children was an unintentional mistake because the appellant thought that this amount was for his own monthly expenditure/responsibility; (c) the appellant's monthly salary as a human resources general manager was RM21,300 per month and his estimated expenditure was RM14,075; and (d) the appellant was experiencing difficulties in paying back the housing loans. In objecting to the said application, the respondent stated, inter alia, that: (i) the appellant's statement was only an afterthought because he had paid the amount of RM14,000 since May 2008 until today; and (ii) the decree nisi was granted on 28 April 2008 and the appellant did not take any steps to get it amended immediately.

Held, dismissing the application in part with costs:

(1) Free access to the children had already been given to the appellant in the

decree nisi. In view of the provision in the decree nisi, both parties were free to embark on it and implement it without a need to get another court order for the same purpose. However, if the respondent was not giving the appellant free access to the children as ordered by the court in the decree nisi, then the appellant could initiate enforcement proceedings, namely, committal proceedings against the respondent for non-compliance of the said order (see paras 13–15).

(2) The appellant consented before the learned judge to make payment of RM14,000 per month to the respondent as maintenance for their two children who were minors. The court, at that time, would never have recorded a consent judgment without the full consent of both parties. It was highly improbable that there was misrepresentation or mistake of fact. Furthermore, the appellant, being educated and holding a high position, could not be permitted to approbate and reprobate after agreeing to pay the amount. Further the fact that the application was made 12 months after the decree nisi was granted clearly showed that the plea of misrepresentation and/or mistake of fact was a mere afterthought (see paras 21, 23(a) & (e)).

(3) There was no material change in the circumstances to justify variation of the amount of monthly maintenance. If the court allowed the variation by reducing it from RM14,000 to RM2,500 per month, the reduction would be very drastic. It would mean that the children would have very little left for their monthly maintenance. This would adversely affect the quality of their lives and deprive them of whatever they had been provided with all this time, and which they were already very used to. It would certainly not be reasonable for the welfare of the children if the court were to allow the variation (see paras 29–30).

(4) Section 76(1) of the Law Reform (Marriage and Divorce) Act 1976 clearly provided that the power of the court to order the division of matrimonial assets is to be exercised at, or is limited to, the time 'when granting a decree of divorce'. Applying the section and the principle laid down in *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21, the appellant's request for the sale and distribution of the matrimonial assets was dismissed on the ground that the court had no longer any jurisdiction over the matter. Since both parties did not disclose any matrimonial assets that needed to be divided at the time when the court granted the decree nisi, it was now left entirely to the parties to agree and decide to sell and distribute their matrimonial assets (see paras 32–35).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap penolakan untuk kebenaran mengubah atau meminda dekri nisi bertarikh 28 April 2008. Perayu memohon, antara

lain, pertemuan yang munasabah dengan anak-anaknya, pengurangan bayaran saraan bulanan daripada RM14,000 kepada RM2,500, pelupusan aset perkahwinan dan pembahagiannya secara sama rata. Alasan-alasan permohonan adalah seperti berikut: (a) responden telah menghalang atau enggan memberikan kebenaran kepada perayu untuk melaksanakan haknya untuk bertemu dengan anak-anak; (b) RM14,000 untuk saraan anak-anak adalah kesilapan yang tidak disengajakan kerana perayu menyangka bahawa jumlah ini adalah untuk perbelanjaan/tanggungjawab bulanannya sendiri; (c) gaji bulanan perayu sebagai pengurus besar sumber manusia adalah RM21,300 sebulan dan anggaran perbelanjaannya adalah RM14,075; dan (d) perayu sedang menghadapi kesulitan dalam pembayaran semula pinjaman rumah. Dalam menentang permohonan tersebut, responden menyatakan, antara lain, bahawa: (a) kenyataan perayu hanyalah sesuatu yang difikir semula kerana dia telah membayar jumlah RM14,000 semenjak Mei 2008 sehingga kini; dan (b) dekri nisi telah diberikan pada 28 April 2008 dan perayu tidak mengambil apa-apa langkah untuk memindanya dengan segera.

Diputuskan, menolak sebahagian permohonan dengan kos:

(1) Pertemuan secara bebas dengan anak-anak telah pun diberikan kepada perayu di dalam dekri nisi. Oleh kerana peruntukan di dalam dekri nisi, kedua-dua pihak bebas untuk memulakan tindakan terhadapnya dan melaksanakannya tanpa perlu mendapatkan satu lagi perintah mahkamah bagi tujuan yang sama. Walau bagaimanapun, jika responden tidak membenarkan perayu bertemu secara bebas dengan anak-anak, perayu boleh memulakan prosiding pelaksanaan, iaitu, prosiding komital terhadap responden bagi ketidakpatuhan terhadap perintah tersebut (lihat perenggan 13–15).

(2) Perayu bersetuju di hadapan hakim yang bijaksana untuk membuat bayaran RM14,000 sebulan kepada responden sebagai saraan untuk kedua-dua anak mereka yang di bawah umur. Mahkamah, pada masa itu, tidak mungkin akan merekodkan penghakiman persetujuan tanpa persetujuan penuh kedua-dua pihak. Adalah tidak mungkin bahawa terdapat salah nyata atau kesilapan fakta. Malahan, perayu, sebagai seorang yang berpelajaran dan berpangkat tinggi, tidak boleh dibenarkan untuk approbat dan reprobat selepas bersetuju untuk membayar jumlah tersebut. Selanjutnya, fakta bahawa permohonan tersebut dibuat 12 bulan selepas dekri nisi diberikan jelas menunjukkan bahawa pli salah nyata dan/atau kesilapan fakta adalah sesuatu yang hanya difikir semula (lihat perenggan 21, 23(a) & (e)).

(3) Tidak ada perubahan yang nyata di dalam keadaan tersebut untuk mewajarkan perubahan jumlah saraan bulanan. Jika mahkamah membenarkan perubahan dengan mengurangkannya dari RM14,000 kepada RM2,500 sebulan, pengurangan tersebut akan menjadi amat

mendadak. Ia akan bermaksud bahawa anak-anak akan mempunyai jumlah yang kurang untuk saraan bulanan mereka. Ini akan menjejaskan kualiti kehidupan mereka dan menafikan mereka daripada apa-apa yang telah diperuntukkan selama ini, dan yang mana mereka telah biasa. Ia jelas tidak munasabah untuk kebajikan anak-anak jika mahkamah membenarkan perubahan (lihat perenggan 29–30).

(4) Seksyen 76(1) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, jelas memperuntukkan bahawa kuasa mahkamah untuk memerintahkan pembahagian aset perkahwinan perlu dilaksanakan pada, atau terhad kepada, 'when granting a decree of divorce'. Mengguna pakai seksyen dan prinsip yang dinyatakan di dalam kes *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21, permohonan perayu untuk penjualan dan pembahagian aset perkahwinan ditolak atas alasan bahawa mahkamah tidak lagi mempunyai bidang kuasa dalam perkara tersebut. Oleh kerana kedua-dua pihak tidak mendedahkan apa-apa aset perkahwinan yang perlu dibahagikan semasa mahkamah memberikan dekri nisi, ia kini terpulang sepenuhnya kepada pihak-pihak untuk mempersetujui dan memutuskan untuk menjual dan membahagikan aset-aset perkahwinan tersebut (lihat perenggan 32–35).]

Notes

For cases on access to children, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2940–2955.

For cases on maintenance, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3484–3514.

For cases on matrimonial home, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3689–3690.

Cases referred to

Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 109; [1997] 1 CLJ 375, CA (refd)

Karunairajah a/l Rasiah v Punithambigai a/p Poniah [2004] 2 MLJ 401; [2004] 2 CLJ 365, FC (refd)

Lau Hui Sing v Wong Chou Yong (f) [2008] 5 MLJ 846, HC (refd)

Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21, FC (folld)

Santha Devi Thuraisingham v A Shanmuganathan [537] MD 7; [1990] 3 CLJ (Rep) 47, HC (refd)

Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2006] 3 MLJ 184; [2006] 5 CLJ 318, HC (refd)

YCC @ JCC v LSY [2006] 7 MLJ 137; [2007] 7 CLJ 207, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 76(1), 83, 92, 96, 97
Rules of the High Court 1980 O 42 r 13

BC Low (Helen Low with him) (Ranjit Ooi & Robert Low) for the petitioner husband (applicant).
James Khong (Carina Wong with him) (James Khong) for the petitioner wife (respondent).

Yeoh Wee Siam JC:

APPEAL

[1] This is an appeal by Geh Thuan Hooi, the petitioner husband ('the appellant') against my decision made in chambers on 2 April 2010 regarding the application in the summons in chambers ('SIC') in encl 11 filed by the appellant on 1 June 2009.

ENCLOSURE 11

[2] The orders prayed for in encl 11 are as follows:

(a) leave to be granted to the petitioner husband to apply for variation or amendment of the decree nisi dated 28 April 2008 under ss 83, 96 and/or 97 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and/or the inherent jurisdiction of this honourable court;

(b) the petitioner husband be granted reasonable access to the children of the marriage, namely, Samantha Geh Wern-Li and Selena Geh Wern-Wern ('the children') including:

(i) alternate weekends from Saturday 10am to Sunday 7pm;

(ii) half of the school end of term or semester holidays for the children respectively;

(iii) alternate public holiday where such holiday is one day, and half of the public holidays where such holidays are more than one day;

(iv) from 5pm on the eve of Chinese New Year to 5pm on the second day of Chinese New Year in every alternate year beginning from year 2010; and

(v) other access as agreed upon between the petitioner husband and the children.

(c) payment of monthly maintenance of RM14,000 for the children which was ordered by the decree nisi dated 28 April 2008 ('the decree nisi') be

reduced to RM2,500 a month for both children until the children become adults respectively or for as long as the petitioner husband is still working, whichever is earlier;

(d) the two matrimonial assets in Sungai Buloh and in Kota Damansara, Petaling Jaya, be sold within three months from the date of this application and the proceeds of sale, less all debts and liabilities be divided equally; and

(e) the matrimonial asset, namely, the apartment in Puchong be sold in three months and the proceeds of the sale, less all debts and liabilities, be divided equally.

GROUNDS OF APPLICATION

[3] Briefly, the grounds of the application (encl 11) as stated in the affidavit in support of the petitioner husband (encl 2) are as follows:

(a) The petitioner wife ('the respondent') obstructed or refused to give permission to the petitioner husband to exercise his right of access to the children. A police report was lodged (paras 5 and 8, exh GTH4).

(b) The petitioner husband is now experiencing difficulties in paying back the housing loans (paras 12, 13 and 14).

(c) The total amount of RM14,000 for maintenance for the children is an unintentional mistake because the petitioner husband thought that this amount was for his own monthly expenditure/responsibility (paras 17 and 18).

(d) The monthly salary of the petitioner husband as a human resources general manager in the group for Sunway Management Sdn Bhd is RM21,300 per month and his estimated expenditure is RM14,075 (paras 21, 22, 23 and 24). The monthly rental that he received from the apartment in Puchong is RM750 a month (para 16).

OTHER AFFIDAVITS FILED

[4] The petitioner husband filed a second affidavit on 23 June 2009 (encl 15).

[5] The petitioner wife filed an affidavit in reply on 10 July 2009 (encl 16) and stated, inter alia, that:

(a) the petitioner husband's statement is only an afterthought because the petitioner husband paid the amount of RM14,000 since May 2008 until today;

(b) the decree nisi was granted on 28 April 2008 and the petitioner husband had obtained a copy of it but he did not take any steps to get it amended immediately (para 9).

[6] The petitioner wife filed a second affidavit in reply on 15 October 2009 (encl 18).

[7] The petitioner husband filed his third affidavit on 29 October 2009 (encl 19).

DECISION

[8] After considering the written submissions of both parties I made the following decision

[9] Prayer 1 for leave to apply for variation of the decree nisi was allowed.

[10] Prayers 2, 3, 4 and 5 were dismissed with costs.

[11] The grounds of my decision are as follows.

Prayer 1

[12] This is a general prayer for leave to apply for variation of the decree nisi. Accordingly, the court granted it. Even though the appeal is against the whole of my decision, I do not think that the appeal should include prayer 1.

Prayer 2

[13] I dismissed prayer 2 because it is not necessary for the access sought in the application to be granted by the court since free access to the children has already been given to the petitioner husband in the decree nisi. The actual words stated in the decree nisi, inter alia, are as follows:

…

DIPERINTAHKAN BAHAWA Pempetisyen-pempetisyen diberi hak jagaan (custody) bersama terhadap anak-anak mereka SAMANTHA GEH WERN-LI (No. Sijil Kelah iran: L141623) dan SELENA GEH WERN-WERN (No. Sijil Kelahiran: AT00983) ('Kanak-Kanak') dengan Hak pemeliharaan dan Kawalan diberi kepada Pempetisyen Isteri serta Hak akses bebas diberi kepada Pempetisyen Suami; …

[14] In view of the above provision where free or liberal access was granted to the petitioner husband, if both parties can now agree on a detailed manner of access as stated in prayer 2 of this application, they are free to embark on it and implement it without a need to get another court order for the same purpose.

[15] However, if the petitioner wife is not giving the petitioner husband free access to the children as ordered by the court in the decree nisi, then the petitioner husband can initiate enforcement proceedings, namely, committal proceedings, against the petitioner wife for non compliance of the said order.

Prayer 3

[16] Prayer 3 is an application by the petitioner husband for the court to allow a variation of the decree nisi in order to reduce the current monthly maintenance for the two children from RM14,000 a month to RM2,500 a month.

[17] The law governing variation of maintenance of a child is provided in ss 96 and 97 of the LRA is as follows:

> 96 Power for court to vary orders for custody or maintenance
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.
>
> 97 Power for court to vary agreement for custody or maintenance
>
> The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

Whether there is any misrepresentation or mistake of fact to justify a variation of the maintenance for the children

[18] The petitioner husband submitted that the decree nisi is ambiguous and that it was recorded based on misrepresentation of facts and/or mistake of fact. He put the blame on his previous solicitors, Messrs Wong & Chua, and contended that the said solicitors did not render proper advice regarding the effect of not agreeing and/or stating matrimonial assets and/or children's

maintenance in the joint divorce petition. He contended that he was advised that the parties could petition for a joint divorce first since parties could not agree upon terms on the division of matrimonial assets, which could be resolved at a later stage after the divorce is granted.

[19] The petitioner husband submitted that by virtue of the decree nisi, he was ordered, inter alia, to pay the sum of RM14,000 towards maintenance for the children without taking into consideration the facts and circumstances of his case, in particular his financial ability and capability. He stated that, at the hearing on 28 April 2008, he was under undue pressure, distress and strain, and was under the misconception that when he was asked by the learned judge as regards monthly payment, it was in relation to his monthly expenses (and not as regards maintenance for the children), and had answered RM14,000. He did not intend and could not have intended the sum to be payment of monthly maintenance for the children, given his financial situation.

[20] From para 17 of the petitioner husband's affidavit in support affirmed on 1 June 2009 and paras 5.7–5.9 of the petitioner wife's affidavit in reply affirmed on 10 July 2009, it is clear that during the hearing of the decree nisi on 28 April 2008 the learned judge noticed that maintenance was not captured in the prayers of the joint divorce petition. In considering whether proper provisions were made to the petitioner wife for the support and care of the children, the learned judge queried the petitioner husband directly as to whether he would be paying maintenance and if so, how much. The petitioner husband had answered RM14,000 per month and consented to paying the same.

[21] The decree nisi was obtained on 28 April 2008 with the petitioner husband consenting and recording before the learned judge to make payment of RM14,000 per month to the petitioner wife as maintenance for their two children who are minors.

[22] No issues were raised prior to and subsequent to the sealing and perfecting of the decree nisi. The decree nisi was later made absolute. In fact, the petitioner husband paid the RM14,000 monthly for the children's maintenance at all material times (see para 21 of the petitioner husband's affidavit in support affirmed on 1 June 2009 and para 9.5 of the petitioner wife's affidavit in reply affirmed on 10 July 2009).

[23] On a balance of probabilities, I am convinced that there was no misrepresentation or mistake of fact on the part of the petitioner husband at the time when the court made the order in the decree nisi regarding the payment by the petitioner husband of the RM14,000 per month for the

maintenance of two children for the following reasons:

(a) This is a joint divorce petition where a consent judgment was recorded. The court, at that time, would never record a consent judgment without the full consent of both parties. It is highly improbable that there was misrepresentation or mistake of fact at the time when the learned judge queried the petitioner husband and then recorded the consent judgment.

In *Lau Hui Sing v Wong Chuo Yong (f)* [2008] 5 MLJ 846 the High Court hold, inter alia, as follows:

> As a general rule, consent order even in a divorce matter must be rarely disturbed unless there are exceptional circumstances and that too clearly stated in the affidavit to warrant the intervention of the court for the benefit of the minor children.

Applying the above principle to the present case, the consent order must be honoured and complied with strictly by both parties, including the petitioner husband, since it was entered into voluntarily.

The petitioner husband is an educated person, being a general manager of human resource in his company. He cannot be permitted to approbate and reprobate after agreeing to pay the said maintenance for his two children. It is clear that he is blowing hot and cold after consenting to the learned judge to the maintenance order of RM14,000 per month (see also *Santha Devi Thuraisingham v A Shanmuganathan* [537] MD 7; [1990] 3 CLJ (Rep) 47 at p 50 a-f; *Karunairajah a/l Rasiah v Punithambigai a/p Poniah* [2004] 2 MLJ 401 at p 406 and 407; [2004] 2 CLJ 365 at p 372 h-iI and 373 a-f, where the Federal Court upheld the Court of Appeal decision in *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109 at p 119; [1997] 1 CLJ 375 at p 387f).

(b) To date, there is no proof that the petitioner husband lodged a complaint or took any action against his previous solicitors for not advising him properly on the matter thereby resulting in any misrepresentation or mistake of fact in the granting of the decree nisi by the court according to the terms of the consent order.

(c) Assuming that there was any misrepresentation, or mistake of fact (which the court does not think so), the petitioner husband would have instructed his previous solicitors to correct the amount of maintenance for the two children at the time when the draft order was sent to the court's registry for approval. However, this was not done. Instead, the sealed copies of the decree nisi were duly extracted.

(d) After the sealed copies of the decree nisi were extracted, if there is any real misrepresentation, of mistake of fact, the petitioner could have applied under O 42 r 13 of the Rules of the High Court 1980 to set

aside or vary the order or judgment within 30 days after the receipt of the order or judgment, but he did not do so.

(e) Since the decree nisi has been granted, the petitioner husband has been paying the monthly maintenance of RM14,000 for the two children. This application was made 12 months after the decree nisi was granted, showing clearly that the plea of misrepresentation and/or mistake of fact is a mere afterthought.

Whether there is any material change in the circumstances to justify a variation of the maintenance for the children

[24] The petitioner husband contended that his net monthly take home pay was RM14,626.25 at the time the decree nisi was made. His budgeted monthly expenses are about RM14,000 a month (see para 21 of the petitioner husband's first affidavit). His personal monthly expenses are about RM7,659 (see para 26 of the petitioner husband's first affidavit). After deducting his budgeted monthly personal expenses from his net take home pay, the balance at the material time was RM6,967.25. This sum is insufficient to meet the financial obligation of the monthly maintenance sum of RM14,000 as ordered under the decree nisi, with a shortfall of RM7,032.75 each month (see para 27 of the petitioner husband's first affidavit).

[25] Based on the petitioner husband's current net take home salary of RM15,229.25, he would still be unable to meet the financial obligations of the monthly maintenance sum of RM14,000, as he would facing a shortfall of RM6,429.75 each month (see paras 6 and 8 of the petitioner husband's affidavit and paras 5.1 and 5.2 of his fourth affidavit).

[26] The petitioner husband also pointed out that his total bank loan outstanding amounts were RM928,645.75 (see para 7.5 of the petitioner husband's second affidavit).

[27] The petitioner wife's second affidavit, p 4, reveals that the petitioner husband also has a tax liability of RM55,519.32 due owing for taxes.

[28] The petitioner husband further submitted that he is currently 53 years and seven months of age, and very close to the retirement age of 55 years, thus facing the problem of income earning ability. The two children are ten years and seven years of age respectively, and do not require the sum of RM14,000 towards their maintenance for a reasonable living standard.

[29] After considering the submissions of both parties I decided that there was no material change in the circumstances to justify a variation of the monthly maintenance of RM14,000 for the following reasons:

(a) According to the petitioner husband's disclosures, his only source of income is his salary and the rental of the Koi Tropika condominium (see para 24 of the petitioner husband's affidavit in support affirmed on 1 June 2009). Between the period of obtaining the decree nisi until today, he has not been drawing a lesser salary. There is thus plainly no proof of a material change in the circumstances.

(b) At the point when the petitioner husband gave his consent for the monthly maintenance of RM14,000 to his children, the bank loans, for the Koi Tropika condominium and his matrimonial home at Sierra Damansara, were already taken out and in existence. He was paying for such loans even prior to the divorce. He now claims that he is unable to finance the loans, but the fact remains that he is not drawing a lesser salary now compared to when the divorce took place. As submitted by learned counsel for the petitioner wife, his mere unwillingness to continue financing the loans cannot by any stretch of imagination constitute a material change in the circumstances (see also *YCC @ JCC v LSY)* [2006] 7 MLJ 137 at para 35; [2007] 7 CLJ 207 at para 35).

(c) The petitioner husband failed to make a full and frank disclosure of his income. The facts show that as at 22 July 2009 the career of the petitioner husband has improved. He was appointed as a Director of Sunway Lagoon Club Bhd, an associated company with the Sunway Management Group where he holds the post of a General Manager, Human Resource. However, the petitioner husband did not disclose this.

The petitioner wife appointed a private investigator and discovered that the petitioner husband was appointed a Director of Sunway Lagoon Club Bhd on 22 July 2009 and he had deposited RM16,240.07 in August 2009 into his Maybank account. The petitioner husband contended that the RM16,240.07 was a one month transaction only and does not include loan amounts held with the respective banks.

The petitioner husband contended that his salary was not increased even though he was appointed as a director. However, he could not explain the discrepancy between his monthly salary of RM29,917 (according to the source at the Employees Provident Fund ('EPF')) and his disclosed salary of RM20,685 (see para 6, and the exhibits, of the petitioner wife's second affidavit affirmed on 15 October 2009).

The petitioner husband was only willing to produce his salary slips showing RM20,685. The court notes that he did not produce his income tax EA Form and his J Form, which are independent documents submitted to the authorities and which are concrete proof of his

declared annual income. Neither did he produce the receipts for payment of his EPF contributions (for both employer and employee's contributions).

(d) The petitioner husband gave a breakdown of his personal expenditure and outgoings but he did not substantiate them by receipts or credit card statements. Neither did he reveal his personal bank account statements showing his true income, expenditure and outgoings. It appears that he is concealing his true financial status, and is therefore unable to discharge his burden of proof in this application (see *Santha Devi Thuraisingham v A Shanmuganathan*).

(e) The petitioner husband is absolutely silent as to his personal assets and investments. This is considered a material non disclosure (see *Lau Hui Sing v Wong Chuo Yong (f)*).

The petitioner husband has bought a new home after the divorce (see para 9 of the petitioner husband's submissions). He now claims that he is in dire financial straits without disclosing his savings, investments and assets. He is not informing the court of the true state of his financial status. This is untenable as he is making this application.

(f) The petitioner husband states that the petitioner wife is working and does not need the maintenance. The maintenance sum is a fact that was known at the time of him consenting to the maintenance order. Nothing has changed. Other than living with and taking care of the children, the petitioner wife's contributions for the children are as set out in para 16 of her affidavit in reply affirmed on 10 July 2009.

The fact that the petitioner wife has an income of her own does not constitute a material change in the circumstances to justify a variation of the order on monthly maintenance for the two children.

(g) It is trite that the welfare of the children is paramount and it shall be the duty of a parent, including the petitioner husband in this case, to maintain or contribute to the maintenance of the children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof (see s 92 of the LRA, and *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2006] 3 MLJ 184 at paras 17–19; [2006] 5 CLJ 318 at paras 17–19).

(h) The petitioner husband's plea, that he is now more than 53 years old and would be retiring soon, cannot be accepted by this honourable court as a material change in the circumstances for the simple reason that his retirement is a prospective event, and currently he has not retired yet but is gainfully employed and doing well in his career. The law, however, does not preclude him from making a further application

for variation a later stage, after his retirement, if he is able to satisfy the court of the material change in his circumstances at that time.

[30] Based on the above, the court was not satisfied that there is a material change in the circumstances to justify a variation of the amount of monthly maintenance. If the court allows the variation by reducing it from RM14,000 to RM2,500 per month, the reduction would be very drastic. It would mean that the children would have very little left for their monthly maintenance. This would adversely affect the quality of their lives and deprive them of whatever they have been provided with all this time, and which they are already very used to. It would certainly not be reasonable or for the welfare of the children if the court were to allow the variation.

Prayers 4 and 5

[31] Prayers 4 and 5 are for distribution of the matrimonial assets after the decree nisi has been granted by the court on 28 April 2008. Such decree nisi has already been made absolute vide the certificate issued by the court dated 30 July 2008.

[32] Section 76(1) of the LRA provides as follows:

> 76 Power for court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

[33] From a reading of s 76(1) of the LRA, it is very clear that the power of the court to order the division of matrimonial assets is be exercised at, or is limited to, the time 'when granting a decree of divorce …'

[34] This provision has been tested and decided in *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21 where the Federal Court held as follows:

> Under s 76(1) and (3) of the Act, the court's jurisdiction to order division of matrimonial asset is limited to the time when granting a decree of divorce or judicial separation and not at a later stage.

[35] Therefore, applying s 76(1) of the LRA and the principle laid down in *Manokaram*, I dismissed prayers 4 and 5 on the ground that the court now no longer has any jurisdiction over the matter since the orders sought are for the sale and distribution of the matrimonial assets *after* the granting of the divorce by the court on 28 April 2008.

[36] Since both parties did not disclose any matrimonial assets that needed to divided at the time when the court was about to grant the decree nisi pursuant to the joint petition for the dissolution of marriage, it is now left entirely to the parties to agree and decide to sell and distribute their matrimonial assets (as disclosed in prayers 4 and 5) accordingly.

[37] For the above reasons, I dismissed the application in encl 11, except for prayer 1, with costs.

Application dismissed in part with costs.

Reported by Ashgar Ali Ali Mohamed